Supreme Court, U.S.
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No. 96-1520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD MUSE, *ET AL.*,
Individually and on behalf of Others Similarly Situated
Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *ET AL.*,

Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In respondents' view, the questions that petitioners claim are presented by this case are as follows:

1. If, contrary to the conclusions of the court of appeals and the district court, "serious consideration" in this case began before all of the members of the plaintiff class left IBM, did the company, upon the commencement of "serious consideration," have an affirmative duty to disclose information about the possible new benefit plan in addition to a duty to avoid giving inaccurate responses to employee questions.

2. Did the court of appeals correctly hold that "serious consideration" does not occur before an employer begins to focus on a particular employee benefit plan for a particular purpose.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to this case are listed in the caption and in the Petition at ii. The following is an affiliate or nonwholly-owned subsidiary of respondent International Business Machines Corporation: Object Design, Inc. We have defined "affiliate" for purposes of this statement as companies in which IBM holds an interest of ten percent or greater of outstanding securities.

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On Petition For a Writ of Certiorari
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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 103 F.3d 490. The district court's Opinion and Order (Pet. App. 10a-20a) and the Magistrate Judge's Proposed Findings of Fact and Recommendation (Pet. App. 22a-36a) are not reported.

JURISDICTION

The court of appeals entered its judgment on December 26, 1996. No petition for rehearing or for rehearing *en banc* was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

New or enhanced retirement, severance and other employee benefit plans typically take effect on a specified effective date. Particularly for employers with many workers, some people invariably miss out on the new or enhanced benefit by reason of having retired or otherwise terminated their employment shortly before the effective date. Sometimes such persons feel so strongly about missing out on the new benefit — even though the effective date was many months after their employment ended — that they sue under ERISA, claiming there was a fiduciary duty to forewarn them that the new or enhanced benefit was in the works, so that they could defer their retirements or resignations in order to qualify for the new benefit.

This is one such case.

The members of the petitioner class quit or retired from IBM's Lexington, Kentucky, facility on various dates from October 31, 1989, through March 31, 1990. Each of them qualified for and received a severance benefit equal to as much as one year's salary and other benefits pursuant to one of three versions of a Voluntary Transition Program (VTP) offered by the Company during this period. As a result of their departures, they could not qualify for a different severance benefit program with richer benefits (LTPP) that was announced on August 1, 1990, in connection with the sale

of a large part of the IBM business in Lexington.[1]

In some cases of this sort, like this case, the new plan was not fully developed and other alternatives were under study when the plaintiffs departed. In other cases, unlike this case, the new plan was in final form and had been endorsed by top management before the plaintiffs left. When faced with issues of this sort, virtually every circuit court has held that no fiduciary duty with respect to the new or amended benefit plan arises until that plan is under "serious consideration."[2]

The earlier cases generally characterize "serious consideration" as an issue of fact without elaborating on the

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[1] The opinions below sometimes refer to these programs as early retirement plans, but it is more accurate to characterize them as severance benefit plans. An early retirement program typically offers some enhancement to the retirement benefit to which employees would otherwise be eligible if they elect to retire by a specified date. A severance benefit program, on the other hand, need not be restricted to those who are or soon would be retirement eligible, and may be limited in other ways, such as to those working at a particular site or in a particular occupational category.

[2] *See, e.g.*, Pet. App. 6a.; *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1538 (3d Cir. 1996) ("*Fischer II*"), *cert. denied*, 137 L. Ed. 2d 329 (1997); *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d, 1154, 1163-64 (6th Cir. 1988); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, 508 U.S. 940 (1993); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995); *Hockett v. Sun Co., Inc.*, Nos. 95-5252 and 95-5255, 1997 U.S. App. LEXIS 5827, at *16 (10th Cir. Mar. 24, 1997); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir. 1991), *cert. denied.*, 502 U.S. 938 (1991); *cf. Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-35 (4th Cir. 1986) (employee who retired before new plan took effect had no standing to sue under ERISA).

meaning of that term. *See Berlin*, 858 F.2d at 1163-64; *Drennan*, 977 F.2d at 251. Some of the more recent cases, however, have attempted to add some guidance, in light of the language and objectives of ERISA, to what is otherwise a wholly conclusory term. Pet. App. 7a; *Fischer II*, 96 F.3d at 1539-40; *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1548-49 (3d Cir. 1996) ("*Kurz II*"); *Hockett*, 1997 U.S. App. LEXIS 5827, at *17-*21. In this case, the court of appeals concluded that the "serious consideration" rule "does not apply until a company focuses on a particular plan for a particular purpose." Pet. App. 7a.

In addition to resolving the events or circumstances that may trigger the beginning of a fiduciary duty with respect to an unannounced benefit plan, disputes sometimes arise in these cases over the scope of that fiduciary duty. Consistent with *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), no circuit court has suggested that deliberate attempts to defraud employees fall outside the fiduciary duty. Conversely, consistent with *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996), virtually every circuit court has recognized that employer decisions regarding whether and when to adopt and how to design a benefit program are settlor not fiduciary functions, so that employers are not obligated to volunteer information about plans not yet announced. All the employer must do, if it elects to respond to employee inquiries about future benefit plans, is to do so truthfully.

Here, after extensive discovery, petitioners and respondents filed cross-motions for summary judgment. The IBM motion contended that serious consideration of the LTPP plan offered in connection with the Lexington sale did not begin before all of the plaintiffs left IBM's employment, so that none of the plaintiffs could recover. Petitioners argued not only that the court could find as a matter of law that serious consideration began as early as the fall of 1989, but

also that there was no genuine dispute that IBM gave misleading responses to employee inquiries, and failed voluntarily to disclose that the Lexington benefit plan was under serious consideration.

The Magistrate Judge, the District Judge and a unanimous three-member panel of the Sixth Circuit have now all concluded that IBM was entitled to summary judgment because the facts of the record indicated that "serious consideration" of the Lexington plan began no earlier than April 1990, and that IBM made no intentional or affirmative misrepresentations.

The facts pertinent to the serious consideration issue are as follows: In August 1989 four IBM manufacturing sites, including Lexington, obtained permission to run a voluntary transition program subsequently known as VTP-I. The program was limited to certain occupational specialties which were overstaffed. Shortly after VTP-I was announced, IBM initiated a series of staff studies in Tarrytown, New York, looking at various measures to reduce costs and improve profitability throughout the entire company. One such study group looked at the possibility of closing the Lexington site as a means of reducing excess capacity and in the course of that work developed some initial cost estimates for closure, including a severance benefit program that might be used in a closure situation. The idea of closing Lexington was fairly promptly rejected, however.

Another study group developed proposals that resulted in a nationwide VTP program announced on December 5, 1989,

known in Lexington as VTP-II.[3/]

Besides the nationwide VTP program, IBM also announced on December 5, 1989, that it would be taking a $2.3 billion write-off against 1989 earnings to cover the cost of the VTP program, as well as various write-downs of inventory and equipment and other company restructuring efforts. No decision had been made at that point precisely what restructuring would occur, although planning officials recognized that some closing or partial closing one or more facilities might be involved. To quantify the potential cost of such restructuring efforts, the staff working on the write-off used cost estimates for closing Lexington, even though closure of that facility was no longer under consideration.

A small task force was created in late 1989 at corporate headquarters in Armonk, New York to explore the possibility of selling IBM's typewriter and small printer business (known within the company as the Information Products or "IP" business) which existed to a large extent at Lexington and to a lesser extent in Boulder, Colorado, and overseas. Operating under the code name "Libra," this exploratory effort was regarded as highly confidential. Because IBM had not been operating Information Products as a separate, stand-alone business, the prospects for a sale were seen as problematic, and the Libra task force had to develop extensive pro forma financials which could be shown to prospective buyers.

Meanwhile, the managers with immediate responsibility for Lexington operations were working on their own proposals to fashion an independent business unit consisting largely of

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[3/] In January, 1990, a special leave of absence feature was added to the nationwide VTP program. This is sometimes referred to in the decisions below as a separate, third version of VTP.

the Lexington portion of the Information Products business. Their staff work included efforts to determine the optimum size of the workforce. In later months, in describing their proposals to top management and senior personnel staff representatives in Armonk, these Lexington managers on some occasions stated that they needed a very lucrative severance program to shrink Lexington's workforce, but they received no promises or assurances that such a severance program would be authorized to facilitate an internal organization.

IBM's first indication that a buyer might be interested in acquiring the Information Products business came in late March or early April, 1990. As discussions with the prospective buyer progressed, the Libra task force was expanded to include staff persons from the personnel discipline who were asked to develop appropriate personnel policies and transition programs to implement a sale, including what became the LTPP severance program. In May 1990 IBM's top management heard presentations pro and con from the advocates of a sale and from the Lexington proponents of the independent business unit approach, and decided to pursue the sale option. Subsequently the personnel group within the enlarged Libra task force, after considering and rejecting various other options, developed its proposal for what became LTPP. Top management approved that proposal in July 1990.

In affirming the District Court and the Magistrate Judge on the serious consideration issue, the court of appeals noted that, unlike the situation in earlier Sixth Circuit cases, such as *Berlin* and *Drennan*, in which the employer was considering whether to reopen an early retirement program that had been used on prior occasions, here IBM was designing a new program to deal with a unique event — the sale of much of the Lexington business. The Court observed that the risk that premature disclosure would mislead or disadvantage employees was much greater in the context of a plan being

newly formulated and that, accordingly, construing the "serious consideration" test to require premature disclosure would be inconsistent with the statutory purposes underlying ERISA's disclosure requirements, could impair the achievement of legitimate business goals by forcing the premature disclosure that a sale might occur, and would not serve the goals of encouraging employers to offer welfare benefit plans and of minimizing the burdens on employers. Pet. App. 6a-7a. Specifically, the court of appeals concluded that serious consideration does not occur until the employer "focuses on a particular plan for a particular purpose." Pet. App. 7a.

Without seeking rehearing or rehearing *en banc*, petitioners filed a timely petition for certiorari on March 25.

REASONS FOR DENYING THE WRIT

By mischaracterizing the decision below, petitioners frame questions that are not properly presented by this case. Moreover, the decision below is entirely in accord with the decisions of this Court, and does not conflict with any decision of another court of appeals. The petition for a writ of certiorari should be denied.

I. PETITIONERS' FIRST QUESTION PRESENTED IS NOT POSED BY THE COURT OF APPEALS DECISION, AND IN ANY EVENT THERE IS NO CIRCUIT CONFLICT OR OTHER SUBSTANTIAL REASON FOR THIS COURT TO REVIEW THAT QUESTION.

The first question framed by petitioners — "Does an employer/ERISA fiduciary have the affirmative duty to disclose truthful information about the serious consideration which it is giving to an enhanced severance plan?" — is not

properly presented by this case. The question assumes that IBM was giving serious consideration to LTPP prior to the time that the members of the petitioner class left the company. But the court of appeals unanimously affirmed the district court's factual finding that serious consideration occurred no earlier than April 1990, after petitioners left the company. *See* Pet. App. 6a; Pet. App. 19a. This case thus does not present the question of whether an employer has an affirmative duty to disclose its developmental work on a new employee benefit plan once that work reaches the point of serious consideration.

The court of appeals did observe that, even after serious consideration begins, an employer has no affirmative duty to disclose information about a possible new or amended plan, but merely a duty to avoid untruthful answers to employee inquiries. *See* Pet. App. 6a. But this dictum is entirely in accord with the decisions of this Court and other courts of appeals so that, even if it represented the holding of the lower court, review on *certiorari* is not appropriate.

As another recent circuit opinion put it: "ERISA contemplates that an employer often will act as both employer and plan fiduciary, and not all of an employer's business activities implicate ERISA's fiduciary duties." *Hockett*, 1997 U.S. App. LEXIS 5827, at *15 (citing *Varity*, 116 S.Ct. at 1071); *see also Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 133 (3d Cir. 1993) ("*Fischer I*"), *cert. denied*, 510 U.S. 1020 (1993).

As this Court reaffirmed just last term in *Lockheed*, 116 S.Ct. at 1789, "[e]mployers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans" (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 1228 (1995)). *Lockheed* explains that, "[w]hen employers undertake those actions, they

do not act as fiduciaries, . . . but are analogous to the settlors of a trust." 116 S. Ct. at 1789 (citing *Curtiss-Wright Corp.*, 115 S.Ct. at 1228; *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994)).

Because such activities are non-fiduciary, the courts of appeals have sensibly declined to impose a duty on employers to affirmatively disclose their work on employee benefit plans before such plans are formally promulgated.[4/] As the court of appeals stated in this case:

> Insisting on disclosure during the formulation of a plan and prior to its adoption would increase the likelihood of confusion on the part of beneficiaries. At the same time management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals.

Pet. App. 6a-7a; *see also Pocchia*, 81 F.3d at 278-79; *Fischer*

[4/] *See* Pet. App. 6a; *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996), *cert. denied*, 136 L. Ed. 2d 220 (1996). ("We . . . hold that a fiduciary is not required to voluntarily disclose changes in a benefit plan before they are adopted."); *Drennan*, 977 F.2d at 251 (a fiduciary need not "disclose its internal deliberations"); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *Sutter v. BASF Corp.*, 964 F.2d 556, 562-63 (6th Cir. 1992); *Berlin*, 858 F.2d at 1164 (employer is under no duty "to say anything at all or to communicate with potential plan participants about the future availability of [a severance plan known as] MIPP"); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995) ("Plan fiduciaries are not obligated under ERISA to provide information to potential plan beneficiaries about possible future offerings."); *Fischer I*, 994 F.2d at 135.

II, 96 F.3d at 1539; *Hockett*, 1997 U.S. App. LEXIS 5827, at *18-*21.[5/]

II. INSOFAR AS PETITIONERS' SECOND QUESTION PRESENTED IS CONCERNED, THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND EITHER THIS COURT'S DECISIONS OR THE DECISIONS OF ANY OTHER COURT OF APPEALS.

In support of their second question presented, petitioners argue that the conclusion by the court of appeals that the serious consideration rule does not apply until an employer "focuses on a particular plan for a particular purpose" constitutes a "bright line" test which has been rejected by a decision of this Court in a securities case and by several courts of appeals dealing with the ERISA issue of "serious consideration." Pet. at 17-22. By omitting the words "focuses on" and frequently suggesting that the court of appeals said "adopts" a particular plan for a particular purpose, petitioners attempt to portray the court of appeals as being unduly rigid.

[5/] Petitioners claim to find support for their theory of affirmative disclosure in cases such as *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747 (D.C. Cir. 1990); *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993) and *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986 (7th Cir. 1993). However, those cases did not involve the particular fiduciary duty established by *Berlin* and its progeny, but rather ongoing administrative issues pertaining to published plans. Thus, in *Eddy* and *Bixler*, the employees alleged that the plan fiduciaries failed to provide complete and accurate information in response to inquiries about the employees' existing group medical coverage. In *Anweiler*, the court held that the plan fiduciary, an insurance company, improperly acted in its own interests when it asked a beneficiary to sign over his rights to the proceeds of an existing group life insurance policy.

Based on that mischaracterization of the court of appeals' decision, petitioners argue that it conflicts with *Basic, Inc. v. Levinson*, 485 U.S. 223 (1988). *Basic* concluded, in the context of the federal securities laws, that "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." 485 U.S. at 236.

Clearly there is no conflict between the court of appeals and *Basic* or any other decision of this Court because neither *Basic* nor any other decision of this Court holds that the interpretation of materiality for purposes of the securities laws is to be followed in the context of claims under ERISA in which plaintiffs are seeking recovery based on allegedly misleading statements.

Moreover, here the lower court did not hold that "serious consideration" arises only when an employer "*decides* that a particular plan *will be offered* for a particular business purpose." Pet. at i (emphasis added). Rather, the court of appeals said that "[t]he exception of serious consideration does not apply until a company *focuses* on a particular plan for a particular purpose." Pet. App. 7a. (emphasis added.)

A variety of facts could show that an employer "focuses" on a particular plan for a particular purpose. Thus, contrary to petitioners' claim, the court of appeals neither adopted a "bright-line" test nor held that serious consideration can arise only after a single business decision or unique event. Rather, the court of appeals merely affirmed the district court's unremarkable factual finding that, in the context of this particular case, "it was not until IBM made a definite decision to sell the Lexington plant and was told by the buyer that further downsizing was necessary that IBM focused on this particular plan for a particular purpose." Pet. App. 7a (citing

Swinney v. General Motors Corp., 46 F.3d 512, 520 (6th Cir. 1995). Petitioners' unhappiness with that factual finding does not create a conflict with *Basic* or any other decision of this Court.

Petitioners also argue that the particular plan/particular purpose formulation conflicts with the decisions of other circuit courts.[6/] This assertion rests on the same misreading of the lower court's decision that led them to incorrectly assert a conflict between that decision and *Basic*. Two of the cases cited by petitioners as being in conflict with the decision below, *Wilson v. Southwestern Bell Telephone Co.*, 55 F.3d 399, 405 (8th Cir. 1995), and *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994), certainly identified the issues of when "serious consideration" occurs and whether misrepresentations are material as questions of fact or mixed questions of law and fact, but they certainly do not reject the notion that until "a company focuses on a particular plan for a particular purpose" alleged misrepresentations are likely to be immaterial. The only other cases petitioners cite as giving rise to a circuit conflict are cases in the Third and Tenth Circuits (*See* Pet. at 21) that have been superseded by subsequent decisions in those circuits.

Indeed, the most recent decisions of the Third and Tenth Circuits are fully consistent with the Sixth Circuit's decision in this case. In *Fischer II*, the Third Circuit concluded that:

[6/] Petitioners also argue that the decision below is in conflict with earlier Sixth Circuit decisions. Pet. at 20-21. That is an issue petitioners should have raised, if at all, in a petition for rehearing addressed to the Sixth Circuit, not a petition for *certiorari* addressed to this Court. *See Wisniewski v. United States*, 353 U.S. 901 (1957). Petitioners also claim to see a conflict with a 1993 Third Circuit decision (*Fischer I*), *see* Pet. at 21, but ignore the subsequent Third Circuit decision in *Fischer II* which is fully consistent with the Sixth Circuit's decision in this case.

> Serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change.

96 F.3d at 1539. The Tenth Circuit recently adopted this same three-part test and cited in support of that result the very Sixth Circuit decision petitioners now attack as being inconsistent with Tenth Circuit law. *Hockett*, 1997 U.S. App. LEXIS 5827, at *16, *19. The conclusions reached in *Fischer II*, *Hockett*, and by the court of appeals here are nearly identical in practice. Clearly, if "a specific proposal is being discussed for purposes of implementation by senior management with the authority to implement the change" within the meaning of *Fischer II*, the employer has necessarily "focuse[d] on a particular plan for a particular purpose" under the Sixth Circuit test.

III. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION AND EITHER THIS COURT'S DECISION IN *VARITY CORP. V. HOWE* OR A RECENT SECOND CIRCUIT DECISION.

In the District Court, in their briefs to the Sixth Circuit, and even in their questions presented in this Court, Pet. at i, petitioners do not suggest that they may recover under ERISA in the absence of serious consideration. But they did call to the attention of the court of appeals this Court's decision in *Varity*, which came down after all briefs were filed below, in a letter to the Sixth Circuit prior to oral argument. In its opinion, the court of appeals, after quoting the holding of *Varity*, observed that the one bit of evidence cited by plaintiffs in support of applying *Varity* was inadequate to justify recovery under the rationale of that case. Pet. App. 8a. In

a subsequent "Supplement to Petition For Writ of Certiorari," petitioners argue vigorously that the decision below is in conflict with *Varity* and a recent Second Circuit decision in holding that there can be the liability in the absence of serious consideration. It is unclear whether petitioners are suggesting without stating a third question presented: whether the Sixth Circuit impermissibly departed from the teaching of *Varity* by holding that petitioners could not recover if they left IBM before serious consideration of LTPP began. Giving petitioners the benefit of every doubt, we will assume that they are arguing that this additional question warrants review by this Court.

In *Varity*, the employer engaged in a plan of deliberate deception designed to persuade employees to transfer to a new subsidiary which was created as a dumping ground for failing business units, and which did not have the resources necessary to pay for the benefit programs it promulgated. The employer intentionally lied to its employees, falsely assuring them, among other things, that their benefits would be safe at the new subsidiary and that the subsidiary had been provided with "the funds necessary to ensure its future viability." 116 S.Ct. at 1072. The new subsidiary went into receivership a short time later. On these facts, this Court held that "we can find no adequate basis here, in the statute or otherwise, for any special interpretation that might insulate Varity, acting as a fiduciary, from the legal consequences of the kind of conduct (intentional misrepresentation) that often creates liability even among strangers." 116 S.Ct. at 1075.

Far from being inconsistent with *Varity*, the court of appeals quoted *Varity*'s holding that:

> plan administrators who "participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the

> beneficiaries' expense" fail to act "solely in the interest of the participants and beneficiaries," and violate the duty of loyalty in Section 404(a)(1) of ERISA.

Pet. App. 8a (quoting *Varity*, 116 S.Ct. at 1074). The court of appeals then applied that holding, but found that "[t]he record does not contain sufficient evidence to establish that IBM knowingly deceived plaintiffs about the possibility of an enhanced plan."[2/] Pet. App. 8a. Thus, petitioners' claim that the court of appeals' decision is inconsistent with *Varity* has no merit.

Finally, in their supplement, petitioners assert that the court of appeals' decision conflicts with *Ballone v. Eastman Kodak Co.*, Nos. 96-7209 and 96-7212, 1997 U.S. App. LEXIS 5430 (2d Cir. Mar. 21, 1997) (Pet. Supp. App. 1a-16a). However, *Ballone* stands merely for a proposition that is uncontroversial in the wake of *Varity*: An employer "may not *actively misinform* its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, regardless of whether or not it is seriously considering future plan changes." Pet. Supp. App. 10a (emphasis added).

[2/] The court of appeals observed that petitioners' "only suggestion of any improper behavior by IBM is the June 14, 1990, memo" which petitioners have reproduced as Appendix E to the petition, but concluded that the June 14 memo showed no intentional deception by IBM. Pet. App. 8a. The June 14 memo claims that IBM employees in Boulder, Colorado — not Lexington, Kentucky — will be unhappy if LTPP is adopted because the Boulder employees were told that "VTP is as good as it's going to get;" the memo says nothing at all suggesting there was a plan intentionally to deceive Lexington employees.

Here, as in *Ballone*, the court of appeals applied *Varity* but on the different factual record the Sixth Circuit quite properly reached a different result: there is no credible evidence that IBM was following a scheme to actively misinform or deceive its employees in Lexington, or anywhere else. Pet. App. 8a. There is no conflict between *Ballone* and the Sixth Circuit opinion in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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